

Exhibit E

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December 13, 2018

VIA E-MAIL

Kim Hutchinson
Deputy Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs
Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201
HHS.ACFO@hhs.gov

Re: Freedom of Information Act Appeal, Case Nos. 2018-00935-FOIA-OS, 2018-00936-FOIA-OS, and 2018-00937-FOIA-OS.

Dear Ms. Hutchinson:

We represent Lambda Legal (“Lambda”) with regard to three requests made by Lambda pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552: Case Nos. 2018-00935-FOIA-OS, 2018-00936-FOIA-OS, and 2018-00937-FOIA-OS. We write today to appeal HHS’s failure to produce any documents in response to Item #1 of Case No. 2018-00935-FOIA-OS, and HHS’s undue delay in responding to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and the entirety of Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS.

I. Background of the Requests

A. Case No. 2018-00935-FOIA-OS

Lambda filed Case No. 2018-00935-FOIA-OS on April 27, 2018. The request comprised of four items:

1. Any records that mention, discuss, reference or relate to HHS’s decision about whether to post, publish or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any

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Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility or service.

2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities.

3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published."

4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not published in the Federal Register.

HHS acknowledged receipt of this request on May 3, 2018.

On September 14, 2018, HHS informed Lambda that no responsive records were found with regard to Item #1. HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations with regard to Items #2 through #4.

Correspondence related to Case No. 2018-00935-FOIA-OS is appended in Attachment 1.

B. Case No. 2018-00936-FOIA-OS

Lambda also filed Case No. 2018-00936-FOIA-OS on April 27, 2018, requesting for the period from January 20, 2017 to the date of the search

[a]ll records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials reflecting communications) between (a) any individual or office at HHS, including its component agencies, and (b) individuals at any of the organizations listed [Table A in the request].

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On May 10, 2018, HHS asked for clarification of the request on the grounds that the original request was “overly broad.” Lambda replied on the same day, clarifying that the request was only for communications between political appointees at HHS and the specified groups and providing the domain names for each group. Despite repeated follow up, HHS has not acknowledged Lambda’s clarification of the request. Nor has HHS provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

Correspondence related to Case No. 2018-00936-FOIA-OS is appended in Attachment 2.

C. Case No. 2018-00937-FOIA-OS

Also on April 27, 2018, Lambda filed Case No. 2018-00937-FOIA-OS, requesting for the period from January 20, 2017 to the date of the search

[a]ny records belonging to, created by, addressed to, or sent to “political appointees” at HHS, including those listed in [Table A in the request], that mention, discuss, reference, or relate to lesbian, gay, bisexual, transgender, or queer (“LGBTQ”) matters or people, from January 20, 2017, through the date the search is conducted.

HHS acknowledged receipt of the request on May 1, 2018. But since then, as with Case No. 2018-00936-FOIA-OS and despite Lambda’s repeated follow up, HHS has not provided any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations.

Correspondence related to Case No. 2018-00937-FOIA-OS is appended in Attachment 3.

II. Item #1 of Case No. 2018-00935-FOIA-OS

Lambda hereby administratively appeals HHS’s September 14, 2018 finding relating to Item #1 of Case No. 2018-00935-FOIA-OS. Based on public information regarding HHS’s activities, we believe that responsive records exist. Further, the correspondence from HHS indicates that only one office was searched, when other offices are likely to hold responsive records. We therefore also challenge the adequacy of the search that did not locate any responsive records.

A. Existence of Responsive Records

As described below, press reporting, HHS’s own statements in federal court, and public records regarding HHS’s regulatory activities all indicate that HHS has been making decisions about whether to post, publish or enforce rules or regulations prohibiting

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discrimination on the bases covered by Lambda's request, including sex, gender, and transgender status. HHS's response that no records were found indicates that its search was not adequate.

Media reporting indicates that since 2017, HHS has undertaken decisions where the record documentation would be responsive to Item #1 of request 2018-00935-FOIA-OS. For example, on February 19, 2018, Politico reported that "upon taking office last year, the Trump administration swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid." Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, Politico (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>. Item #1 of Case No. 2018-00935-FOIA-OS would cover records related such a decision by HHS to halt action on proposed regulations prohibiting discrimination in Medicare and Medicaid on the basis of sex, sexual orientation, gender, identity, gender expression, sex stereotypes, or transgender status. The Politico article indicates that HHS made such decisions in 2017, and, thus, that HHS holds records responsive to Lambda's request. HHS must make these records promptly available pursuant to its FOIA obligations. *See* 5 U.S.C. § 552(a)(3)(A).

HHS has also indicated in federal court that it is undertaking decisions regarding the enforcement of regulations prohibiting discrimination in all health programs or activities administered by HHS on the basis of (among others), sex, sex stereotyping, gender, gender identity, and transgender status. *See* 45 C.F.R. §§ 92.2, 92.4. Specifically, HHS is involved in active litigation regarding whether to enforce the gender identity-related provisions of 45 C.F.R. § 92, a nondiscrimination regulation applicable to all health programs or activities administered by HHS, including the Medicare Part D program. *See Franciscan All. v. Price*, No. 7:16-cv-00108-O (N.D. Tex.). On October 15, 2018, HHS informed the court in this proceeding that HHS is "reevaluating the reasonableness, necessity, and efficacy" of 45 C.F.R. § 92. Status Report at 1, *Franciscan All.*, No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2018), ECF No. 119. In the process of this evaluation, it would be reasonable to assume that HHS has created records related to decisions on whether to enforce the rule. Because the specific context of the litigation is a regulation regarding prohibiting gender identity discrimination, these decisions would relate to the bases for discrimination outlined in Item #1. Insofar as these decisions also impact nondiscrimination in Medicare or Medicaid and related programs, the associated records are responsive to Lambda's request, and, therefore, must be made available promptly. *See* 5 U.S.C. § 552(a)(3)(A).

Further, the public rulemaking docket indicates that HHS is also active in creating new nondiscrimination rules and regulations related to 45 C.F.R. § 92. Because 45 C.F.R. § 92 prohibits discrimination in HHS's programs, such as Medicare and Medicaid, on bases including sex, sex stereotyping, gender, gender identity, and transgender status, records

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documenting HHS's decisions about whether to post or publish this new proposed rule are responsive to Item #1. In particular, on April 13, 2018, HHS submitted a draft proposed rule to the Office of Management and Budget ("OMB") entitled "Nondiscrimination in Health Programs and Activities." OMB, Pending EO 12866 Regulatory Review, RIN 0945-AA11, <https://www.reginfo.gov/public/do/eoDetails?rrid=127999>. HHS cited this draft proposed rule to the court in *Franciscan Alliance* as related to the issues in that litigation, which include nondiscrimination provisions barring discrimination related to gender identity that would apply to HHS's health programs—such as Medicare and Medicaid programs. See Status Report at 1, *Franciscan All.*, No. 7:16-cv-00108-O (N.D. Tex. Oct. 15, 2018), ECF No. 119. This rulemaking demonstrates that records responsive to Lambda's request exist, and they must promptly be made available as required by 5 U.S.C. § 552(a)(3)(A).

B. Adequacy of the Search

When an agency responds to a request under FOIA by stating that no responsive records were found, the requester can challenge the adequacy of the search. See *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 67-68 (D.C. Cir 1990). The agency must then show that its search was "reasonably expected to produce the information requested." *Id.* at 68. Although an agency is not required to "search every division . . . when the agency believes that responsive documents are located in one place," *Defenders of Wildlife v. U.S. Dep't of Agric.*, 311 F. Supp. 2d 44, 56 (D.D.C. 2004), a agency's search is "not sufficiently thorough" if it does not cover offices that are "likely repositories of responsive records," *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 13-14 (D.D.C. 2004).

With respect to the search carried out for Item #1 of request 2018-00935-FOIA-OS, the specific examples outlined above suggest that HHS has been engaged in decision-making that would generate records relevant to Lambda's request. Although we do not have information regarding the search terms and methods used originally, we hope that the information provided here may assist with renewed searches that are "reasonably calculated" to locate responsive records. See *Dep't of Agric.*, 311 F. Supp. 2d at 54.

Furthermore, HHS's September 14 correspondence states that a representative from the Office for Civil Rights (OCR) conducted the search to locate materials responsive to for Item #1 of request 2018-00935-FOIA-OS. It appears from the correspondence that this was the only office searched. However, at least two other HHS offices are "likely repositories of responsive records." *Dep't of Interior*, 314 F. Supp. 2d at 13.

First, because Lambda's request relates to rules or regulations prohibiting discrimination in Medicare or Medicaid, responsive documents would likely be in the custody of the Centers for Medicare & Medicaid Services ("CMS"). Second, since the request covers decisions about whether to post, publish or enforce rules or regulations, it is reasonable to expect that

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the Office of Intergovernmental and External Affairs (“IEA”) would have responsive records due to its role of intergovernmental policy liaison.

Based on HHS’s response that no responsive records were located, despite public information indicating that HHS has undertaken decisions that would generate records responsive to the request, the search was not reasonably calculated to find the information sought. Further, offices likely to have records were not searched, indicating that the search was not sufficiently thorough. As a result, HHS did not make reasonable efforts to search for records responsive to Item #1 of request number 2018-00935-FOIA-OS.

III. Items #2 Through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS

Lambda also hereby appeals HHS’s undue delay in failing to respond to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS. As explained, HHS has failed to provide Lambda with any responsive records, an estimate of the number of responsive records, or even a date by which HHS estimates it will be able to comply with its statutory obligations as to these requests. Indeed, HHS has not even acknowledged receipt of Lambda’s clarification to Case No. 2018-00936-FOIA-OS.

Lambda appreciates that HHS may currently face a large number of FOIA requests relative to its capacity to respond to those requests. Nonetheless, HHS remains under a statutory duty to respond to FOIA requests within thirty working days. 5 U.S.C. § 552(a)(6). It has now been over six months since Lambda filed the three requests, yet Lambda still has not received any substantive response as to Items #2 through #4 of Case No. 2018-00935-FOIA-OS or to Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS—or even an indication of when HHS expects to provide a substantive response. The delays are particularly confounding as to Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS because of the limited nature of the requests. Both requests relate to a limited number of identified individuals and/or organizations, for a period of less than two years.

HHS’s failure to discharge its statutory obligations is unacceptable. HHS’s failure to respond to these requests within the time period required by the FOIA serves as a constructive denial of the requests, and Lambda is deemed to have exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i). Lambda insists that HHS exercise the diligence required by law and provide the records responsive to Items #2 through #4 of Case No. 2018-00935-FOIA-OS and Case Nos. 2018-00936-FOIA-OS and 2018-00937-FOIA-OS by Friday, January 18, 2019. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

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Thank you very much for your consideration of this appeal. If you have any questions or require any additional information, please contact Veronica Till Goodson directly at (202) 887-3719 or Minh Nguyen-Dang at (202) 887-3681.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica Till Goodson".

Veronica Till Goodson
Minh Nguyen-Dang

cc: Omar Gonzalez-Pagan
Avi Garbow
Minh Nguyen-Dang